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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

IGNACIO GUTIERREZ et al., Plaintiffs and Respondents, v. RUBEN GUTIERREZ, Defendant and Appellant.	F042469 (Super. Ct. No. 289879) **OPINION**
IGNACIO GUTIERREZ et al., Plaintiffs and Appellants, v. RUBEN GUTIERREZ et al., Defendants and Respondents.	F042834 (Super. Ct. No. 289879) Stanislaus County

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Klein & Wilson and Mark B. Wilson for Defendant, Appellant and Respondent Ruben Gutierrez and for Defendants and Respondents Tropicale Foods, Inc., Guadalupe Gutierrez and Manuel Gutierrez.

Downey Brand, Kevin M. Seibert, Janlynn R. Fleener and Richard K. Sueyoshi for Plaintiffs, Respondents and Appellants Ignacio Gutierrez and Paleteria La Michoacana, Inc.

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Appellant Ruben Gutierrez appeals from the judgment awarding damages to his brother, Ignacio Gutierrez, in the amount of $215,857.30, based upon a finding that Ruben[1] violated a covenant not to compete. Ruben contends the covenant not to compete set forth in their partnership agreement does not apply because (1) a subsequent integrated agreement did not include a covenant not to compete, and (2) the covenant not to compete is inapplicable when the partnership dissolves. Ruben also contends there were numerous evidentiary errors at trial. In a cross-appeal, Ignacio claims the trial court erred when it refused to issue a permanent injunction against Tropicale Foods, Inc., Helados Mexico, Guadalupe Gutierrez, and Manuel Gutierrez. We agree with Ruben's first contention and reverse the judgment.

PROCEDURAL AND FACTUAL SUMMARY

Brothers Ruben and Ignacio signed a General Partnership Agreement effective January 1, 1999. For a period of years prior to signing the written partnership agreement, the brothers had operated a business, La Michoacana, that manufactured and sold ice cream. When they sought to expand the business, the bank required a written partnership agreement.

The written partnership agreement specified the terms under which a partner could retire or withdraw and provided for the dissolution of the partnership. The partnership established a formula for valuation of a partnership interest in the event of the withdrawal

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1 As the parties have the same last name, we will refer to them by their first names for clarity, not out of disrespect.

or retirement of a partner. The value of the partner's interest was fixed at an amount equal to the yearly gross sales of the partnership business for the fiscal year in which the partner retires or withdraws. The payment to the retiring or withdrawing partner was to be paid in cash within 12 months of the date of retirement or withdrawal, with no interest to accrue on the unpaid balance. The partnership agreement contained a covenant not to compete, specifying that following the retirement or withdrawal of a partner from the partnership, the withdrawing or retiring partner "shall not carry on a business similar to the business of the Partnership within the state of California for a period of ten (10) years."

The partnership agreement also provided that "Within 20 days after any individual becomes a Partner, or a Partner marries, the Partner shall have the Partner's spouse execute a consent in a form acceptable to all of the Partners, unless the Partner's spouse is already a partner." The record does not contain any consent form signed by Ruben's or Ignacio's spouse, nor is there any assertion that the spouses were partners in the enterprise or parties to the partnership agreement.

Shortly after signing the written partnership agreement, Ruben and Ignacio decided to terminate their partnership. The partnership's attorney, Richard M. Archbold, sent a letter dated April 8, 1999, to the brothers that stated, "The partnership itself as a legal entity by definition requires two partners." The letter went on to state that the brothers had three options. First, bring in a new partner immediately and have Ruben withdraw; second, bring in another partner at some future point, at which time Ruben would withdraw as a partner; and third, "sell the ongoing business to Ignacio, transferring to him the assets, obligations, name, trademark and good will of the partnership and dissolve and wind up the partnership under terms for payment by Ignacio that both of you would accept."

After receiving the letter from Archbold, the partners signed a document entitled "Purchase and Sale Agreement" (hereafter second agreement). Prior to signing this document, Ignacio had it reviewed by his own attorney. Despite the captioning of the document as a purchase and sale agreement, the body of the document provided:

> "1. **TERMINATION OF PARTNERSHIP.** Effective April 8, 1999 (the 'Effective Date'), the Partnership shall be dissolved and the Seller shall receive his half of any profit from operations. The parties shall execute, publish and record legally appropriate and sufficient notices of the dissolution and termination of the partnership and of the fact that Seller will carry on the business formerly conducted by the Partnership as sole proprietor."

Ignacio is identified as the buyer and Ruben is identified as the seller in this second agreement. The second agreement further provided that "This Agreement embodies the entire agreement and understanding among the parties and there are no agreements, representations or warranties other than those set forth herein." The second agreement does not contain a covenant not to compete.

The second agreement established a different valuation formula for a partnership interest and different payment terms than those set forth in the partnership agreement. Payments were to be made over 32 months instead of the 12 months provided for in the partnership agreement. Further, the value of a partnership interest was fixed at $1 million instead of the yearly gross sales of the business during the fiscal year in which the partnership terminated, as called for by the partnership agreement. In 1999, the yearly gross sales were $1.9 million.

In August 1999, Ruben moved from Modesto to Southern California and, along with his wife, Guadalupe, started an ice cream business called Tropicale Foods, Inc.

When Ignacio filed his tax return for 1999, he asserted under penalty of perjury that the second agreement he entered into with Ruben did not include a covenant not to compete.

Starting in late 2000, the market share and profits of Ignacio's business, Paleteria La Michoacana, Inc., began to decline as a result of competition from Tropicale Foods, Inc.

In April 2001, Ignacio sued Ruben and Tropicale Foods, Inc., alleging that the covenant not to compete contained in the partnership agreement survived the termination of the partnership.

Ruben asserted that the second agreement was an integrated agreement that did not contain a covenant not to compete and, because it was an integrated agreement, the parol evidence rule barred the introduction of any evidence that would modify or alter its terms. The trial court denied Ruben's various motions to end or restrict the lawsuit.

The jury made a finding that the covenant not to compete in the partnership agreement should apply to the second agreement. The jury also found that Ruben violated the covenant not to compete, which resulted in damages to Ignacio in the amount of $215,857.30.

The trial court thereafter entered a judgment against Ruben and in favor of Ignacio for $215,857.30 in damages. In addition, the trial court entered a permanent injunction against Ruben and four nonparties, Tropicale Foods, Inc., Helados Mexico, Guadalupe Gutierrez, and Manuel Gutierrez. On Ruben's motion, the judgment was amended to delete the nonparties.

DISCUSSION

Ruben contends the trial court erred prejudicially when it admitted parol evidence to modify the terms of the second agreement, as that document is an integrated agreement. Ruben raises numerous additional issues. We conclude, however, that the admission of parol evidence to vary the terms of the second agreement was reversible error, thus we need not address Ruben's other issues.

Ignacio appeals, contending the trial court erred when it excluded Tropicale Foods, Inc., Helados Mexico, Guadalupe Gutierrez, and Manuel Gutierrez from the permanent injunction. Because we will reverse the judgment, the permanent injunction will be dissolved and we need not address the issues raised in Ignacio's appeal.

I. Ruben's Appeal

Standard of Review

The parol evidence rule is set forth in Code of Civil Procedure section 1856.[2] In relevant part, that rule provides that terms set forth in a writing intended by the parties as a final expression of their agreement may not be contradicted by evidence of any prior or contemporaneous agreement. (§ 1856, subd. (a).) Additionally, section 1856, subdivision (b) precludes the introduction of evidence of consistent or supplemental terms if the writing is intended as a "'complete and exclusive statement of the terms of the agreement.'" (*Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 637.)

Ignacio contends that the standard of review on the admissibility of parol evidence is the abuse of discretion standard. He is incorrect. The determination of whether a document is an integrated agreement is a question of law. (*Haggard v. Kimberly Quality Care, Inc.* (1995) 39 Cal.App.4th 508, 517.) The issue of whether parol evidence is admissible is one of law. (*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1001.) An appellate court is not bound by a trial court's determination on the admissibility of parol evidence. (*Ibid.*)

Integration Clause and Parol Evidence Rule

The parties agree that the second agreement contains an integration clause. The parties, however, disagree as to the effect of that clause.

Ignacio contends that the second agreement establishes the full and complete agreement regarding only the purchase price and payment terms, and that the partnership agreement "addressed issues concerning the terms on which the brothers' [*sic*] had agreed to operate their business." Ignacio contends that the partnership agreement applies to

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

complete, or fill in, the terms and conditions of the buyout and withdrawal and therefore the covenant not to compete remained in effect.

Ruben contends that the second agreement sets forth the complete terms and conditions of the buyout and withdrawal, and that the partnership agreement is inadmissible to add to, or alter, the terms in the second agreement.

Whether the parties intended the second agreement to serve as the exclusive embodiment of their agreement is the crucial issue. (*Banco Do Brasil, S.A. v. Latian, Inc., supra,* 234 Cal.App.3d at p. 1001.) Generally, when the parties adopt an integration clause, it is very persuasive, if not controlling, on the issue of integration. (*Id.* at pp. 1002-1003.) In determining whether an agreement is integrated, the court may consider evidence of the circumstances surrounding the formation of the written agreement. (*Haggard v. Kimberly Quality Care, Inc., supra,* 39 Cal.App.4th at p. 518.)

Here, the partnership agreement and the second agreement were entered into within a few weeks of each other. The covenant not to compete is set forth as paragraph 17.C of the partnership agreement. Paragraph 17 deals with the death, withdrawal, incompetency or bankruptcy of a partner. Virtually all the necessary terms for effecting a purchase and sale of a partnership interest are set forth in paragraph 17 of the partnership agreement.

When Ruben and Ignacio decided not to continue as partners, they sought advice from the partnership's attorney, Archbold. In part, Archbold advised them to "sell the ongoing business to Ignacio, transferring to him the assets, obligations, name, trademark and good will of the partnership and dissolve and wind up the partnership under terms for payment by Ignacio that both of you would accept." After receiving this advice from Archbold, the brothers entered into the second agreement, which provided for the dissolution of the partnership and significantly altered the valuation of a partnership interest and the payment terms.

A writing may constitute only a partial integration. To determine whether the writing is intended as a partial or full integration, we assess whether the collateral agreement might naturally be made as a separate agreement, or whether it most likely would have been included in the main agreement. (*Banco Do Brasil, S.A. v. Latian, Inc., supra,* 234 Cal.App.3d at p. 1002.)

The language of the second agreement indicates that it was intended to be a fully integrated agreement. On its face, it purports to describe fully the agreement for the purchase by Ignacio and the sale by Ruben of Ruben's partnership interest and the conduct of the parties after the sale. The second agreement addresses the amount to be paid for Ruben's partnership interest, the payment terms, preparation of a note and security agreement, apportionment of liabilities of the partnership, transfer of title of partnership assets, assumption of partnership leases, preparation of final tax returns for the partnership, indemnification, and dissolution of the partnership. The second agreement also contains clauses stating that the agreement is binding upon the heirs and assigns of the two parties, as well as the integration clause.

Under the second agreement, Ruben received only $1 million for his partnership interest, instead of the $1.9 million he would have received under the valuation terms set forth in the partnership agreement. In addition, Ruben was to receive payments over a period of 32 months instead of the 12 months provided for in the partnership agreement. Thus, under the second agreement, Ruben received significantly less money and payments were spread over a longer period of time. Common sense dictates that if the parties intended the covenant not to compete to apply to the second agreement, the sales price would not have been reduced nearly in half and the payment period would not have been expanded from one year to nearly three years.

In addition to altering many of the provisions earlier set forth in the partnership agreement, such as the valuation and payment terms for a partnership interest, the second agreement repeats many of the standard clauses found in the partnership agreement, such as the notice provisions, an integration clause, and binding effect upon heirs. If the partnership agreement were to be read in conjunction with the second agreement, as Ignacio contends, there would be no need to repeat provisions contained in the partnership agreement. If the covenant not to compete were intended to be part of the second agreement, one would expect it to be set forth in the second agreement, as other provisions from the partnership agreement were incorporated into the second agreement. (*Banco Do Brasil, S.A. v. Latian, Inc., supra,* 234 Cal.App.3d at p. 1002.)

Also, and importantly, the presence of an express integration clause in the second agreement is a clear statement of the intent of the parties. (*Banco Do Brasil, S.A. v. Latian, Inc., supra,* 234 Cal.App.3d at p. 1003.) The integration clause in the second agreement provides that the "Agreement embodies the entire agreement and understanding among the parties and there are no agreements, [or] representations … other than those set forth herein" and "any provision hereof may not be changed, waived, discharged or terminated in whole or in part, except in writing." Virtually every necessary aspect of the purchase and sale, and the relationship of the parties after the sale, is set forth in the second agreement. Parol evidence is not admissible to vary, or to add to, the terms of an integrated agreement. (*Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 500.)

Even if the second agreement is viewed as ambiguous as to whether dissolution of the partnership or a buyout is contemplated, the integration clause precludes admitting parol evidence to read additional terms, such as a covenant not to compete, into the second agreement. (*Larsen v. Johannes, supra,* 7 Cal.App.3d at p. 500.)

Alternatively, if the second agreement were to be read in conjunction with the partnership agreement, the covenant not to compete still would not apply. The covenant not to compete is inapplicable when the partnership is dissolved. Although the second agreement addresses the sale of Ruben's partnership interest, it does so in the context of the dissolution of the partnership. That the partnership had to be dissolved is axiomatic.

By definition, a partnership is "an association of two or more persons to carry on as coowners a business for profit." (Corp. Code, § 16101, subd. (7).) Where there are two partners and one withdraws from the partnership, there is a dissolution of the partnership as a matter of law. (*Ocean A. & G. Corp. v. Industrial Acc. Com.* (1930) 104 Cal.App. 34, 38.)

Finally, Ignacio concedes that the second agreement is an integrated and unambiguous agreement. Despite this concession, Ignacio contends that section 1856, subdivisions (b) and (g) permit him to offer parol evidence of the circumstances under which the second agreement was made and Ignacio's understanding of the meaning of the terms set forth in the second document. He is incorrect. These statutory provisions come into play only when "'upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said but by showing what they meant *by* what they said.'" (*Berverdor, Inc. v. Salyer Farms* (1950) 97 Cal.App.2d 459, 462.) As Ignacio concedes, however, there is no doubt or ambiguity on the face of the contract.

We conclude the second agreement is a fully integrated agreement. (*Haggard v. Kimberly Quality Care, Inc., supra,* 39 Cal.App.4th at p. 517.) Therefore, evidence of the covenant not to compete is precluded by the parol evidence rule as it is offered to add to and vary the terms of the second agreement. (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175-176.)

Conclusion

California has a well-settled policy in favor of open competition. (*Howard v. Babcock* (1993) 6 Cal.4th 409, 416.) This strong public policy, in combination with the express integration clause in the second agreement, leads us to conclude that the covenant not to compete had to be set forth in the second agreement to be applicable and enforceable.

Our conclusion requires reversal of the judgment. "'If the additional terms are such that, if agreed upon, they would *certainly* have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.'" (*Masterson v. Sine* (1968) 68 Cal.2d 222, 228.) The trial court erred in admitting testimonial and documentary evidence of the covenant not to compete.

Having concluded that the judgment must be reversed, we need not address the other issues raised by Ruben.

II. Ignacio's Appeal

Ignacio contends that the trial court should have entered a permanent injunction against Tropicale Foods, Inc., Helados Mexico, Guadalupe Gutierrez, and Manuel Gutierrez, in addition to the injunction issued against Ruben. Because the injunction is premised upon the covenant not to compete being applicable and enforceable, and we have concluded it is not, we will vacate the injunction.

DISPOSITION

The judgment is reversed. The permanent injunction is vacated. Ruben's request for judicial notice filed April 30, 2003, is denied. The superior court is directed to enter judgment in favor of Ruben. Costs are awarded to Ruben.

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CORNELL, J.

WE CONCUR:

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DIBIASO, Acting P.J.

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BUCKLEY, J.